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IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY, PETITIONER

v.

STAN HENDRICKSON AND FRITZ DEGNER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL SHERIFFS' ASSOCIATION ET AL. AS AMICI CURIAE

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AMICI CURIAE BRIEF OF THE NATIONAL SHERIFFS' ASSOCIATION, ET AL.

The National Sheriffs' Association, et al., respectfully submit this *amici curiae* brief. Pursuant to Supreme Court Rule 37.3(a), counsel of record have received timely notice of the intent to file this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Sheriffs' Association (the "NSA") is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940 the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

Amici represent the nation's sheriffs who operate more than 3,000 local correctional facilities throughout the country. The vast majority of these facilities house both pretrial detainees and convicted inmates.[1] Sheriffs, as the custodians of the inmates housed within these facilities, are charged with

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[1] For the purposes of this brief unless noted otherwise, pretrial detainees include any inmate, including arrestees, who have not been convicted.

providing a safe and secure environment for both the inmates and for their staff.

In this case under review, the Seventh Circuit affirmed the district court's judgment dismissing petitioner's action under 42 U.S.C. 1983, which alleged that the respondent county jail officials had employed excessive force in transferring him to a cell within the facility. In reviewing this case and rendering its decision, *amici* respectfully ask this Court to apply the same Constitutional standard concerning use of force by correctional staff on incarcerated persons regardless of whether they are pretrial detainees or convicted inmates.

SUMMARY OF ARGUMENT

Jails in the United States house a mixture of both pretrial and convicted inmates. The housing and classification of inmates in a jail are not based on their pretrial versus convicted status but rather on a behavioral and security based classification system utilizing a multitude of factors. As such, pretrial and convicted inmates are housed together.

This Court has already held, in *Whitley v. Albers*, 475 U.S. 312 (1985), that force used as part of a good-faith effort to restore prison security does not violate an inmate's Eighth Amendment rights. Further, in *Hudson v. McMillian*, 503 U.S. 1 (1991), this Court expanded on *Whitley* to hold that correctional deputies inflict cruel and unusual punishment under the Eighth Amendment if they use force maliciously and sadistically to cause harm rather than in a good-faith effort to maintain or restore discipline. What has not been established by this Court is whether this same standard applies to pretrial inmates.

Pretrial and convicted inmates are housed together in jails, sometimes in the same cell. Both types of inmates may be involved in a single incident that may require correctional deputies to use force to enforce the safety and security procedures of a jail. Accordingly, there should be one universal standard regarding the use of force in a custodial setting regardless of an inmate's status as pretrial or convicted. Pretrial and convicted inmates are required to abide by the same rules of behavior. To treat various classes of inmates differently as to the amount of force needed to enforce jail safety procedures is counterproductive to the overall safety of all inmates and staff. Further, given that both pretrial and convicted inmates are housed together based upon numerous classification criteria, as a practical matter, it would be impossible for deputies responding to an incident in a housing module to distinguish between inmates in order to maintain or restore order.

As amici curiae, the National Sheriffs' Association respectfully suggests that it is time for this Court to end any ambiguity concerning the standard for the use of force by custodial staff in maintaining safety, security, order, control and discipline in a correctional facility. The Sheriffs of the United States submit there is one universal standard regarding the use of force on inmates, and it is the one articulated by this Court in *Whitley v. Albers* and *Hudson v. McMillian*. The Court's decision in this case should emphasize that the same standard applies to both pretrial detainees and convicted inmates.

ARGUMENT

I. There Should Be One Constitutional Standard for the Application of Force in a Correctional Facility, and That Standard Is the One Articulated in *Whitley v. Albers* and *Hudson v. McMillian*.

A. Jails Hold Both Pretrial and Convicted Inmates

Sheriffs' Offices throughout the country maintain jails for the purpose of detaining adults who are either charged with criminal law violations and are awaiting trial or who are sentenced adult criminal offenders. In 2013, local jails housed approximately 731,200 incarcerated individuals.[2] Of the 731,200 inmates held in local jails, 38% of them were convicted inmates, while 62% were pretrial detainees.[3]

Many of the concerns relating to jail violations or "in custody" behavior are not distinguishable based upon an inmate's conviction status. Physical assaults, drug violations, alcohol violations, possession of weapons, possession of stolen property, escape attempts, and other major violations are committed by both pretrial detainees and sentenced inmates.

Additionally, the nature of criminal offenses and criminal sophistication do not change based upon the

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[2] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Correctional Populations in the United States, 2013, NCJ 248479 (Dec. 2014), http://www.bjs.gov/content/pub/pdf/cpus13.pdf.

[3] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Jail Inmates at Midyear 2013-Statistical Tables, NCJ 245350 (May 2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf.

conviction status of inmates in the jails. Indeed, this Court has recognized that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals." *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S.Ct. 1510, 1520 (2012).

Jails house a variety of inmates. Among them are pretrial detainees accused of nonviolent crimes ranging from theft offenses to drug offenses and violent crimes including rape, assault, manslaughter, and murder. Additionally, jails can house convicted inmates sentenced for some of those very same offenses. In some states convicted inmates can be sentenced to serve their confinement in a county jail for periods exceeding one year.[4] Pretrial inmates can also be detained for periods exceeding one year in a county jail while waiting for their cases to be adjudicated.[5] Finally, inmates who are convicted of more serious offenses and who are sentenced to state prison are often returned to county jails and commingled with pretrial detainees while waiting to be transferred to state prison.

Jails hold both pretrial detainees charged with crimes and inmates convicted of the very same criminal

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[4] According to a survey conducted by the California State Sheriffs' Association, as of April 25, 2014, there were 1635 county jail inmates sentenced to between 5 and 10 years and 124 inmates sentenced to over 10 years in county jail in California. California State Sheriffs' Association, *Updated Survey of Long Term Offenders in County Jails*, (2014), http://www.calsheriffs.org

[5] See *United States v. Briggs* 697 F.3D 98 (2d Cir. 2012) upholding the pretrial detention of a defendant for over 26 months, and *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000), *cert. denied*, 531 U.S. 801 (2000) upholding a projected pretrial detention of between 30 and 33 months.

offenses. Sheriffs' deputies cannot reasonably be expected to distinguish among inmates based solely upon their conviction status when attempting to maintain or restore order in a jail facility.

B. Jail Inmates Are Not Housed Based On Their Conviction Status

There is no doubt that a long-established body of Constitutional law, utilizing the "deliberate indifference" standard, obligates a correctional facility to take reasonable measures to provide for the safety of inmates. Those measures include steps to reduce the risk of harm from other inmates. *Farmer v. Brennan*, 511 U.S. 825 (1994). In addition to enforcing rules of behavior, some of which on occasion require the use of force, a major tool used by corrections administrators to accomplish their mission is a comprehensive system of inmate classification. The purpose of inmate classification is to ensure that housing protects the vulnerable from the predatory, the weak from the strong and the potential perpetrator from the potential victim[6].

The conviction status of an inmate within a correctional setting is relevant only as one of many objective classification factors used to help jail administrators provide a safe and secure facility. Objective classification factors also include, but are not limited to, criminal sophistication, seriousness of offense, medical or mental health needs, "in custody" behavior, and security risk. Relying solely on an inmate's conviction status to determine housing for an

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[6] James Austin, *Objective Jail Classification Systems: A Guide for Jail Administrators*, (February 1998), p. 1, 8.

inmate could, in and of itself, represent a constitutional violation and clearly is inconsistent with modern professional standards. The use of an objective classification system helps improve the level of safety for inmates and staff. Failure to employ such a classification system has resulted in liability both under 42 U.S.C. §1983 and state law. See, *Jensen v. Clarke*, 94 F. 3d 1191 (8th Cir. 1996); *McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975).

In a modern facility, staff interaction with inmates, as both a practical and legal matter, generally does not differ based upon an inmate's conviction status. Inmates, regardless of conviction status, are expected to follow all rules of behavior. It seems that only in the area of use of force, as it relates to inmates, is there left a question as to whether conviction status requires differing treatment among similarly confined inmates. The National Sheriffs' Association believes that conviction status does not require different standards for use of force, and it is for this very reason that the Association submits this brief.

C. There Is No Constitutional Basis For A Distinction Between Pretrial and Convicted Inmates

Decisions of this Court regarding convicted inmates' Constitutional rights have long been applied to pretrial detainees. In the seminal case of *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court recognized that "simply because prison inmates retain certain Constitutional rights does not mean that these rights are not subject to restrictions and limitations." This Court went on to hold that this principle applies equally

to pretrial detainees and convicted prisoners. *Id.* at 546.

In *Turner v. Safley*, 482 U.S. 78 (1987) this Court examined the constitutionality of regulations affecting inmate correspondence and inmate marriages under the First Amendment. In so doing this Court made no distinction between pretrial detainees and convicted inmates. *Turner* is heralded as the leading Supreme Court decision in the area of correctional law and is universally applied to both pretrial and convicted inmates.

In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) this Court examined whether an inmate's Eighth Amendment rights were violated for failure of the correctional facility to provide adequate medical care. *Estelle* is the foundation for the legal analysis regarding medical care and is universally applied to both pretrial and convicted inmates.

In *Wilson v. Seiter*, 501 U.S. 294 (1991), an inmate filed an action against prison officials under 42 U.S.C.S. § 1983. The inmate alleged that a number of the conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In examining the issue, this Court stated that "[W]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." *Id.* at 303. *Wilson* is universally applied to both pretrial and convicted inmates as it relates to conditions of confinement cases.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), this Court held that a prison official may be held liable under the Eighth Amendment for acting with

"deliberate indifference" to inmate health or safety only if the official knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Farmer* is the foundational precedent applied without distinction to the inmate's convicted status regarding the duty to protect as well as other claims alleging violations of the Eighth Amendment. No distinction was made between pretrial detainees and convicted inmates.

In *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) this Court examined the religious rights of "current and former inmates" of institutions operated by the Ohio Department of Rehabilitation and Correction under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc (2000), *et seq.*, without making a distinction between pretrial detainees and convicted inmates. *Cutter*, 544 U.S. at 723. RLUIPA's arms extend to *all* institutionalized persons, focusing on those incarcerated in jails and prisons. This Court unanimously held that RLUIPA was constitutionally enacted.

In *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510 (2012), this Court examined pretrial detainees' Fourth and Fourteenth Amendment rights against strip searches noting that:

> Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies. Facility personnel, other inmates, and the new detainee himself or herself may be in danger if these threats are introduced into the jail population. This case presents the question of what rules, or

> limitations, the Constitution imposes on searches of arrested persons who are to be held in jail while their cases are being processed. The term "jail" is used here in a broad sense to include prisons and other detention facilities.

Florence, 132 S. Ct. at 1513.

This Court also noted the extent of jail populations and the difficulties inherent in jails, as opposed to prisons, as follows:

> The difficulties of operating a detention center must not be underestimated by the courts. *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Jails (in the stricter sense of the term, excluding prison facilities) admit more than 13 million inmates a year. See, *e.g.*, Dept. of Justice, Bureau of Justice Statistics, T. Minton, Jail Inmates at Midyear 2010--Statistical Tables 2 (2011). The largest facilities process hundreds of people every day; smaller jails may be crowded on weekend nights, after a large police operation, or because of detainees arriving from other jurisdictions. [1] Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face. The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld "if it is reasonably related to legitimate penological interests." *Turner, supra*, at 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64; see [1516] *Overton v. Bazzetta*,

> 539 U.S. 126, 131-132, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). But see *Johnson* v. *California*, 543 U.S. 499, 510-511, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (applying strict scrutiny to racial classifications).
>
> ...
>
> *Bell*, 441 U.S., at 546, 99 S. Ct. 1861, 60 L. Ed. 2d 447 ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of retained constitutional rights of both convicted prisoners and pretrial detainees").

Florence, 132 S. Ct. at 1515-1517.

As this Court recognized in *Bell*, an inmate's convicted status does not diminish the potential for contraband to be smuggled into the facility. In the *Florence* decision, this Court echoed *Bell* and affirmed *Turner* by holding that correctional officials have a legitimate governmental interest to maintain safety and security for all who live and work in these institutions. This Court has recognized that under the Fourth and Fourteenth Amendments even arrestees are treated the same as pretrial detainees and convicted inmates for the purpose of strip searches when entering general population. *Florence*, 132 S. Ct. at 1523.

In *Holt v. Hobbs*, 135 S. Ct. 853 (2015) this Court held a Department's policy violated RLUIPA, which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an "institutionalized person," unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling

governmental interest. This Court did so without making a distinction between pretrial and convicted inmates.

In sum, this Court does not distinguish between pretrial and convicted inmates in examining claims of Constitutional violations relating to conditions of confinement (*Bell*), involving rights of freedom of speech and marriage of inmates (*Turner*), inadequate medical care of inmates (*Estelle*), conditions of confinement (*Wilson*), duty to protect inmates (*Farmer*), freedom of religion of inmates (*Cutter* and *Holt*), or strip searches of inmates (*Florence*). Accordingly, no such distinction should be made regarding claims of excessive use of force by staff in correctional facilities.

D. There Should Be One Universal Constitutional Standard Regarding the Use of Force On Inmates

Use of force scenarios are fluid, ever evolving and changing. A deputy in the jail does not have the ability to determine during an incident whether the Fourth, Eighth, or Fourteenth Amendment applies to a particular inmate. What they do have, is the ability to ascertain the threat they perceive by the inmate and information available to them, the need for force at that given moment, the amount of force they will choose in relation to the need for the use of force, and if an option, any efforts made to de-escalate the situation. It would be unrealistic to inflict upon deputies a different use of force standard depending on the status of the inmate. There should be but one standard applied to the use of force in a correctional setting. The standard previously articulated by this Court in *Whitley v. Albers* and

Hudson v. McMillian is the correct standard.

The reality of jail management is that confining inmates in close proximity with one another has the obvious potential for violence. Responding to violence as a general rule requires the use of some level of force and restraint measures by staff. Depending upon the perceived threat, the response may range from simply coercing inmates to comply with orders to using deadly force. Such risks are a natural result of having to supervise, control, and manage both pretrial and convicted inmates who are involuntarily incarcerated. Deputies must protect themselves and others, but always with the concern that their protective actions will be evaluated after the fact by persons who have never had to risk personal injury to restore or maintain order in a jail.

Deputies must control inmates and manage the jail regardless of the inmate's status. When inmates act out in ways that upset order and discipline they must be controlled and order restored. It is not an option for a deputy to ignore or fail to act when such actions occur. Restoring and maintaining order in the jail is the duty of all detention staff regardless of the inmate's status. Detention staff who work in jails are at constant risk of harm in dealing with inmates regardless of their conviction status. Deputies cannot determine solely by looking at an inmate which one is more likely to engage in an unprovoked assault on staff. Nor can a deputy determine during a facility disturbance which inmates are more likely to resist efforts to restore or maintain order. Detention deputies have a legitimate interest in maintaining safety, security, order, control, and discipline. As a result they must act to restore order when inmates become destructive, threatening, aggressive, or

engaged in actions that could result in self-inflicted injury, regardless of the inmate's conviction status. [7]

The foundation of all legal analysis regarding use of force begins and ends with this Court's two leading decisions regarding force in custodial settings, *Whitely v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992).

Whitely set the standard for use of force scenarios in which force is applied during "exigent circumstances", or decisions made in haste, under pressure, or without the luxury of a second chance. In those circumstances this Court departed from its previous standard of deliberate indifference (criminal recklessness), and held that when evaluating use of force, the issue is *whether the force was applied in a good faith effort to maintain and restore discipline, or maliciously and sadistically for the very purpose of causing harm.*

In all other use of force scenarios, the standard articulated in *Hudson* applies.

In *Hudson*, this Court articulated a five-part test to be applied in use of force decisions regarding inmates. The *Hudson* factors provide an excellent framework by which to develop written policies and procedures, reporting and review instruments, as well as staff training. This Court's decision appeared to recognize the very substantial differences between needs and requirements for the use of force *outside corrections facilities* and use of force *inside jails and prisons*. Jails and prisons confine in close proximity

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[7] The Amici adamantly oppose force as punishment, as was articulated in *Whitley v. Albers*. We continue to strongly endorse that constitutional view.

large numbers of inmates, *both pretrial and convicted together*, many of whom have some violence in their criminal histories and who may act violently without provocation or warning.

The five factors of *Hudson* become relevant in determining whether force was applied in a good faith effort to maintain and restore order or was malicious and sadistic for the very purpose of causing harm. The appropriate factors for determining the reasonableness of force are:

1. The threat(s) to safety, security, order, control, and/or discipline perceived by the responsible detention deputy;
2. Whether in light of the perceived threat(s), the responsible detention deputy believed force was necessary to resolve the threat(s);
3. The amount or severity of force used by the responsible detention deputy in relation to the need for force;
4. What efforts were made by the responsible detention deputy to temper the forceful response; and
5. The extent of the injury, if any, suffered by the inmate.[8]

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[8] This court affirmed the continued viability of *Hudson v. McMillian* in *Wilkins v. Gaddy*,*559 U.S. 34* (2010) reiterating that the extent of the injury is only one of the factors to be considered in determining if the force applied was malicious and sadistic for the very purpose of causing harm, or whether the force applied was "reasonable" [T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Hudson*.

As to convicted inmates *Whitley* and *Hudson* are indisputably recognized as the controlling precedent.

E. ***Whitley* and *Hudson* Have Been Applied To Pretrial Detainees**

As to pretrial detainees *Whitley* and *Hudson* are recognized in multiple circuits as also providing the controlling precedent. See *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000), ("the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers*, and *Hudson v. McMillian*, citations omitted, apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance."); *Scarbro v. New Hanover County*, 374 Fed. Appx. 366, 369-370 (4th Cir. 2010), (pretrial detainees are held to the same burden of proof for excessive force claims as convicted inmates); *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993)(for "excessive use of force claims by pretrial detainees...we are guided by the standard announced in *Whitley* and *Hudson*"); *Kitchen v. Dallas County*, 759 F.3d 468, 477 (5th Cir. 2014)"; *Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010)(applying the Eighth Amendment standards to evaluate a use of force claim by a pretrial detainee.); *Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir. 1991), *cert. den.*, 502 U.S. 1074 (1992)(citing *Whitley* and finding that it is not "inappropriate that the same standard may be used under the Fourteenth and Eighth Amendment."; *Walton v. Gomez*, 745 F.3d 405,426 (10th Cir. 2014)(applying the *Whitley* and *Hudson* factors in examining a use of force claim by a pretrial detainee. including the motives of the state actor.); *Bozeman v. Orum*, 422 F.3d 1265 (11th Cir. 2005)("whether or not a

prison guard's application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.").

These circuits have wisely recognized and applied this constitutional standard to all inmates within the correctional setting regardless of an inmate's status. This exceptional working standard requires a deputy to perceive a threat by an inmate, determine whether force is needed and, if force is needed, apply the necessary amount to maintain or restore order. This Court has long applied its decisions regarding convicted inmates to pretrial detainees. The jails in the United States house both pretrial and convicted inmates together. To have a different standard for pretrial detainees in the jails is unrealistic and unmanageable.

CONCLUSION

For these reasons, the National Sheriffs' Association urges this Court to end any ambiguity and clearly state that there is but one Constitutional standard to be applied to the use of force on both pretrial detainees and convicted inmates in any correctional setting. That standard is the one previously articulated by this Court in *Whitely v. Albers* and *Hudson v. McMillian*.

Respectfully submitted,

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